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**IN THE
COURT OF APPEALS OF INDIANA**

TERRY D. NEUKAM,

Appellant-Defendant,

vs.

STATE OF INDIANA,

Appellee-Plaintiff.

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No. 82A01-0608-CR-342

APPEAL FROM THE VANDERBURGH CIRCUIT COURT

The Honorable David D. Kiely, Judge

Cause No. 82C01-0511-FD-1281

March 5, 2007

MEMORANDUM DECISION - NOT FOR PUBLICATION

BAKER, Judge

Appellant-defendant Terry D. Neukam appeals his conviction for Theft,¹ a class D felony. Specifically, Neukam claims that his conviction must be reversed because the trial court engaged in an improper ex parte communication with the jury. Neukam also maintains that the maximum three-year sentence² was inappropriate in light of the nature of the offense and his character. Finding no error, we affirm the judgment of the trial court.

FACTS

On November 9, 2005, at approximately 11:20 a.m., Wal-Mart loss prevention employee Jarod Nation observed Neukam acting suspiciously in the Evansville store. At some point, Nation observed Neukam select three digital cameras from a display counter and put them in a shopping cart. However, after Neukam passed through a different section of the store, he removed some empty Wal-Mart bags from his coat and placed the cameras in the bags. Nation also observed that a security tag that had been attached to one of the cameras was missing.

Neukam next selected a women's tracksuit and placed it one of the other empty bags. Neukam then proceeded to the front of the store and walked outside without making any attempt to pay for the items. When Nation approached, Neukam tossed his bags into a nearby shopping cart and denied that the items were his. Thereafter, Neukam was arrested and charged with theft.

¹ Ind. Code § 35-43-4-2.

² Indiana Code section 35-50-2-7 provides that "A person who commits a Class D felony shall be imprisoned for a fixed term of between six (6) months and three (3) years, with the advisory sentence being one and one-half (1 1/2) years."

At Neukam's jury trial, which commenced on June 21, 2006, the State presented the testimony of Nation and an Evansville police officer who had prepared an incident report. The only exhibit offered at trial was a photograph of the stolen items. During jury deliberations, the bailiff received a note which read: "Can we see the police report, security officer's report from Wal-Mart?" Appellant's App. p. 3. Without notifying the parties, the trial court issued the following response to the jury: "You have all the evidence you are going to receive." Id.

Neukam was found guilty as charged and sentenced to a three-year term of incarceration. At the sentencing hearing, the trial court found no mitigating circumstances and identified Neukam's criminal history as a significant aggravating factor. Neukam now appeals.

DISCUSSION AND DECISION

I. Response to Jurors' Question

Neukam first argues that his conviction must be reversed because the trial court erred in answering a jury question without notifying or informing him of the proposed response to the question. Thus, Neukam claims that the trial judge engaged in an improper ex parte communication with the jurors.

In resolving this issue, we note that our Supreme Court has observed the following procedure that our trial courts should follow when a jury makes a request for additional guidance during deliberations:

[The trial judge should] notify the parties so they may be present in court and informed of the court's proposed response to the jury before the judge ever communicates with the jury. When this procedure is not followed, it is

an ex parte communication and such communications between the judge and the jury without informing the defendant are forbidden. However, although an ex parte communication creates a presumption of error, such presumption is rebuttable and does not constitute per se grounds for reversal. When a trial judge responds to the jury's request by denying it, any inference of prejudice is rebutted and any error deemed harmless.

Bouye v. State, 699 N.E.2d 620, 628 (Ind. 1998) (emphasis added).

In this case, the trial court simply denied the jury's request to review evidence that had not been admitted. The trial court's response that "you have all the evidence you are going to receive," appellant's app. p. 3, does not imply that there was any evidence that the jury could not see. Rather, it is apparent that the response to the question was merely a restatement of the trial court's preliminary instruction that the jury members should "confine [their] attention to the court proceedings, listen attentively to the evidence as it comes from the witnesses, and render a verdict solely upon what you hear and see in this court." Tr. p. 94. As a result, we cannot say that the trial court's response had any improper influence on the jury. Thus, Neukam's claim of error fails.

II. Sentencing

Neukam next claims that his sentence was inappropriate. Specifically, Neukam claims that the sentence should be revised pursuant to Indiana Appellate Rule 7(B) because the trial court failed to identify his cooperation with the police as a significant mitigating factor.

In resolving this issue, we note that this court has the constitutional authority to revise a sentence if, after "due consideration" of the trial court's decision, this court finds that the sentence is "inappropriate in light of the nature of the offense and the character of

the offender.” Ind. Appellate Rule 7(B). However, our review under Appellate Rule 7(B) is “very deferential” to the trial court’s decision. Martin v. State, 784 N.E.2d 997, 1013 (Ind. Ct. App. 2003). Put another way, sentencing determinations are within the sound discretion of the trial court, and we will only reverse for an abuse of discretion. Krumm v. State, 793 N.E.2d 1170, 1186 (Ind. Ct. App. 2003). An abuse of discretion occurs if the trial court’s decision is clearly against the logic and effect of the facts and circumstances before the court. Id.

We also note that finding the existence of mitigating circumstances is within the trial court’s discretion. Glass v. State, 801 N.E.2d 204, 208 (Ind. Ct. App. 2004). The trial court is not required to assign the same value to a mitigating circumstance as does the defendant. Id. More specifically, “trial courts are not obligated, in every situation, to consider a defendant’s decision to plead guilty as a significant mitigating factor.” Kinkead v. State, 791 N.E.2d 243, 247 (Ind. Ct. App. 2003).

With regard to the nature of the offense, we note that Neukam stole a number of luxury items from Wal-Mart that he most likely intended to sell for a profit. Obviously, Neukam did not steal three cameras from the store as a matter of necessity. Also, while Neukam maintains that the trial court should have considered his cooperation with authorities a significant mitigating factor, it is apparent that his cooperation occurred only as the result of his immediate apprehension. In other words, the circumstances here indicate that Neukam’s decision to cooperate with the police may have been merely a pragmatic one. See Glass, 801 N.E.2d at 209 (holding that a defendant’s decision to cooperate with authorities is not entitled to mitigating weight when it is only pragmatic).

As for Neukam's character, the record shows that he has accumulated eleven prior felony convictions for various offenses including two for burglary, two for theft, and one for resisting law enforcement. Tr. p. 149. Neukam's criminal history illustrates his lengthy and continued disrespect for the law, and his repeated contacts with the criminal justice system obviously have had no impact on persuading him to reform. Thus, we cannot say that the trial court's imposition of a three-year sentence was inappropriate in light of the nature of the offense and Neukam's character.

The judgment of the trial court is affirmed.

DARDEN, J., and ROBB, J., concur.